LEONG KOK HUAT

v.

PP

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL KADIR MUSA J
[CRIMINAL APPEAL NO: 43-2 OF 1998]
12 JUNE 1998

CRIMINAL LAW: *Immigration Act 1959/ 1963 - Section 55D - Forgery or alteration of endorsement or document - Penalties prescribed - Whether to be imposed alternatively or comulatively*

CRIMINAL PROCEDURE: *Sentence - Alternative sentences - Principles of sentencing - Immigration Act 1959/1963, s. 55D - Fine, imprisonment and/or whipping - Whether to be construed disjunctively or conjunctively - "And" - "Shall be liable to" - Absence of comma - Whether discretion of court absolute - Whether s. 294 of Criminal Procedure Code may be invoked - Sequence of penalties prescribed, relevance of*

CRIMINAL PROCEDURE: *Appeal - Notice of appeal by Public Prosecutor - Whether must be filed personally by A-G - Whether may be filed by Solicitor General - Leave to appeal - Whether mandatory - Whether must be obtained within 14 days - Courts of Judicature Act 1964, s. 50(2), (2A), (3) - Criminal Procedure Code, s. 376(1) - Federal Constitution, art. 145(1), (2), (3)*

CRIMINAL PROCEDURE: *Appeal - Notice of appeal by Public Prosecutor - Whether Solicitor General may act and carry out functions of Public Prosecutor - Absence or inability of A-G - Whether A-G must be on official leave or out of country - Criminal Procedure Code, s. 376(2) - Federal Constitution, art. 145*

WORD & PHRASES: *"Absence" - Criminal Procedure Code, s. 376(2) - Whether connotes physical absence - On official leave or out of the country - Whether Solicitor General shall act as Public Prosecutor in absence of A-G*

WORD & PHRASES: *"And" - Immigration Act 1959/1963, s. 55D - Whether effect disjunctive or conjunctive - Use of comma - Whether penalties to be imposed alternatively or cumulatively*

WORD & PHRASES: *"Shall be liable to" - Interpretation - Judicial discretion - Sentencing - Comparison with "shall be punished"*

The accused was arrested on 19 December 1997 and charged under s. 55D of the Immigration Act 1959/1963 ('the Act') for falsifying visiting passes and visa documents. The accused was alleged to have sold each of the documents at RM250 and had been doing that ever since the Immigration Department started to introduce the 'Temporary Six-Month Work Permits'. The accused pleaded guilty to the charges and was convicted and sentenced to five years' imprisonment and four strokes of the rotan and fined RM50,000.

The accused's application for a stay of execution pending the outcome of his appeal was refused by the magistrate. The accused could not and did not pay the fine.

An application was then made by the accused for the case to be revised under s. 323 of the Criminal Procedure Code ('the CPC'). At the revision the instant court set aside the sentence and substituted it with only a fine of RM65,000. As the accused was unable to pay the enhanced fine, the court allowed him to pay by installments. (The Solicitor General has since appealed to the Court of Appeal *vide* her notice of appeal dated 4 May 1998.)

Held:

[1] According to s. 55D of the Act, each limb of the penalty part of the section, ie, (i) a fine, (ii) imprisonment, (iii) whipping, should be construed 'disjunctively' from one another and not 'conjunctively'.

[2] The word "and" therein was intended by the Legislature to have a disjunctive effect based on the propositions that: (i) 'and' implies variety and therefore the penalties provided for in s. 55D of the Act are different ways of imposing the three types of sentences; and (ii) the presence of the word "and" without a comma after each limb should and must be construed as disjunctive and not conjunctive.

[3] The presence of the words " ... shall ... be liable to ..." in s. 55D of the Act gives the court a complete judicial discretion as to what should be regarded as the appropriate sentence after having judicially considered all the facts of the particular case. The court may impose the three types of penalties therein either alternatively or cumulatively, and may even resort to invoking s. 294 of the CPC.

Per curiam:

[1] Section 50(3) of the Courts of Judicature Act 1964 ('the CJA') provides that the "notice of any appeal by the Public Prosecutor shall be given by, or with the consent in writing of, that officer only ... ." The presence of the words "by the Public Prosecutor" and "or with the consent in writing of, that officer only" requires that such a notice be filed by the Attorney General personally by virtue of art. 145(1), (2) & (3) of the Federal Constitution ('the FC') read together with s. 376(1) of the CPC – and not by the Solicitor General.

[1a] If the Public Prosecutor himself does not file or give his written consent to file such a notice, then by virtue of s. 50(2) & (2A) of the CJA, any such notice filed without first obtaining leave from the Court of Appeal will not be valid in law. Unless and until such mandatory leave is obtained within 14 days after the court's decision on revision, there can be no appeal against such a decision to the Court of Appeal.

[1b] By virtue of s. 376(2) of the CPC, the Solicitor General may act and carry out the functions of the Public Prosecutor in the case of the latter's 'absence' or inability to act. The word 'absence' connotes not just physical absence from his office, but that the Attorney General should at least be on offical leave or out of Malaysia at the material time. According to the facts, on 4 May 1998, the Attorney General was in Johor Bahru performing his official duties. Thus there was no such 'absence' referred to in s. 376(2) of the CPC and the Solicitor General could not exercise any of the powers of the Attorney General entrenched in art. 145 of the FC. The notice purported to be filed in the 'absence' of the Attorney General was bad in law and there could be no appeal before the Court of Appeal.

[Order accordingly.]

Cases referred to:
Cooper v. Croll [1940] IDLR 610 ***(foll)***
Jayanathan v. PP [1973] 2 MLJ 68 ***(foll)***
Mohamed Abdullah Ang Swee Kang v. PP [1988] 1 MLJ 167 ***(foll)***
Nili Anak Gumbang & Ors v. PP [1985] 1 CLJ 402 ***(foll)***
PP v. Abdullah Pandak Hassan & Anor [1975] 2 MLJ 276 ***(cit)***
PP v. Khairuddin [1981] 1 CLJ 86 ***(foll)***
PP v. Leonard Glenn Francis [1989] 1 CLJ 972 ***(refd)***
PP v. Man Ismail [1939] MLJ 207 ***(refd)***
PP v. Syarikat Perusahaan Makanan Haiwan Berkerjasama [1969] 2 MLJ 250 ***(refd)***
PP v. Wahab [1964] 30 MLJ 265 ***(foll)***
R v. Ball [1951] 35 Cr AR 164 ***(foll)***

Legislation referred to:
Control of Supplies Act 1961, s. 22(i)
Corrosive and Explosive Substances and Offensive Weapons Ordinance 1958, s. 6(1)
Courts of Judicature Act 1964, ss. 50(2), (2A), (3)
Criminal Procedure Code, ss. 294, 323, 325(1), 326, 376(1), (2), 422
Emergency Immigration Amendment Order 1984 [Brunei], s. 56
Federal Constitution, art. 145(1), (2), (3)
Firearms (Increased Penalties) Act 1971, s. 8
Food Control (Rice Miling) Regulations 1950, reg. 5
General Clauses Enactment 1959 [Brunei], s. 38
Immigration Act 1959/63, s. 55D
Immigration (Amendment) Act 1996, s. 16
Immigration Enactment [Brunei], s. 56
Interpretation Acts 1948 & 1967, s. 111(1)
Penal Code, ss. 408, 409
Prevention of Crime Ordinance 1959, s. 15(4)
Vagrants and Decrepit Persons Enactment, s. 3(a)

Other sources referred to:
Chambers Encyclopedia English Dictionary, 1994, p 5
Concise Oxford Dictionary, 1995, 9th edn, p 46
Legislature Drafting, Thornton, 1987, 3rd edn, p 287

Reported by Mariette Peters-Goh & Gan Peng Chiang

JUDGMENT

Abdul Kadir Musa J:

On 21 January 1998 Mr. RR. Mahendran, acting for and on behalf of Leong Kok Huat, the accused, in the case of **A 83-1-98** which was dealt with by Johor Bahru Magistrate's Court on 1 January 1998, wrote a letter (please see encls. (1) & (2)) to the court to seek its indulgence to have his client's case revised under s. 323 of the Criminal Procedure Code ('the CPC') **and** urged the court to act accordingly under s. 325(1) of the same Code. Under the current administrative arrangement, his matter was assigned to my court. That being so **and** upon close perusal of his said letter, I decided to oblige his request by fixing the revision to be heard on 21 April 1998. At this juncture, it would be most appropriate for me to briefly outline the chronology of events which ultimately culminated in the filing of a Notice of Appeal **by** the learned Solicitor General dated 4 May 1998 **against** my decision **on** Revision.

The accused was arrested on 19 December 1997 and subsequently charged for an offence under s. 55D of the Immigration Act 1959/63 (Act 155) ("the Act 155"). The charge against him reads as follows:

> Bahawa kamu pada 19.12.1997 jam lebih kurang 10.05 malam, di rumah No. 82, Jalan Kosa 7, Taman Perling, didalam daerah Johor Bahru didalam Negeri Johor Darul Takzim didapati telah memalsukan Pas Lawatan dan juga Visa, butir-butir seperti di lampiran, milik Jabatan Imigresen Malaysia. Oleh itu kamu telah melakukan kesalahan dibawah Seksyen 55 D Akta Imigresen 1953/63 (Pindaan 1997) dan boleh dihukum dibawah Seksyen yang sama.

All the falsified documents referred to in the "butir-butir seperti dilampiran" were subsequently tendered and received by the court below as P3A-P3H (for "Pas Lawatan"), P4A-P4E (for "Pas Lawatan berbentuk sticker") and P5A - P5C ("Visa"). The accused pleaded guilty to the said charge, whereby the brief facts of the case was received by the said court as P2.

From P2, it was clear that the accused sold each of the falsified documents at RM250. He was doing that ever since the Immigration Department started to introduce "Temporary 6 Months Work Permits" and made no denial to that. As such he was found guilty and subsequently convicted by the court below and was sentenced to (i) a fine of RM50,000, (ii) an imprisonment term of five years and (iii) 4 strokes of rotan. The accused's application for stay of execution in respect of the said fine and imprisonment term was refused by the learned magistrate pending the outcome of his appeal. **The accused could not and did not pay the fine.**

It is important to note at this very juncture that, **at** the time of hearing the revision, there was **no** typed note of the proceedings in the file that was transmitted to me for consideration. As such, I have to be contented with only what were **then** available in the said file; the **most important was the particulars contained in "Court 114"**.

From the relevant "Court 114" **under the column of "Pendapat" or "Findings", it was left vacant.** There was **no** recording of the learned magistrate's findings as to the accused's **"Guilt and Conviction"** in that column (Please see *PP v. Abdullah bin Pandak Hassan & Anor* [1975] 2 MLJ 276.) which, in an appropriate case, attracts any conviction and sentence imposed to be set aside even though the accused has pleaded guilty to the offence preferred against him **unless** it can be saved by s. 422 of the CPC. Furthermore, **without** the benefit of the typed note of what was written by the said learned magistrate **and or** my inability to dicipher his handwriting, I could not find any such notation to that effect. It was in that context that I decided to invoke s. 326 of the CPC by inviting both Encik Mahendran and Encik Ishak Yusof, the learned Deputy Public Prosecutor, to address me accordingly.

Flowing from the above, and in their respective submissions, both Encik Mahendran and Encik Ishak agreed that, failure to record the necessary "Guilt and Conviction" **after** the accused has pleaded guilty and accepted the facts **in** respect of the offence levelled against him **without** the operation of s. 422 of the CPC, exposed the accused's "Conviction and sentence" wide open to be set aside by the court on revision. However, in the course of Encik Mahendran's submission and my pointing out to him that I was satisfied on the facts that there was **no** miscarriage of justice under s. 422 of the CPC, he was contented **not** to pursue any further with the **issue of "wrong conviction" but** only confine to persuade the court to revise the sentence imposed by the court below to a more just and equitable one. The learned DPP on the other hand, urged me **not** to disturb the sentence so imposed in the light of the current situation in connection with various offences relating to falsifying the travel documents and the influx of the illegal immigrants to Malaysia.

After careful consideration of the submissions from both parties **and** all the relevant facts of the case as a whole, I am of the view that any offence under s. 55D of the Act 155 cannot be taken lightly. However, having regard to the sentencing policy alongside with the legislative intention of the "penalty parts" in the said section, I held that, the sentence so imposed by the learned magistrate, in the circumstances of the facts of the instant case, is a little bit too harsh. As such, I set aside the said sentence and substituted it with **only** a fine of RM65,000. As he was unable to pay the said **enhanced fine** (ie, from RM60,000 enhanced to RM65,000), I allowed him pay by instalments. It is against my said decision (ie, imposing **jus**t a fine), that the learned Solicitor-General appealed *vide* her Notice of Appeal dated 4 May 1998. Before I proceed to give my reasons for doing so, it would be most appropriate for me at this juncture to be permitted to comment on the **legality** of the very Notice of Appeal aforesaid itself.

In filing the said Notice of Appeal ("the Notice"), the learned Solicitor-General must have acted under s. 50(3) of the Courts of Judicature Act 1964 ("the 1964 Act") **without** the need of obtaining the necessary leave to appeal from the Court of Appeal. Section 50(3) of the 1964 Act provides:

> (3) **Notice of any appeal by the Public Prosecutor shall be given by, or with the consent in writing of, that officer only;** and notwithstanding subsection (2) no leave of the Court of Appeal is required. (Emphasis, bold).

The presence of the words "**by** the Public Prosecutor" and "or **with** the consent in writing **of that officer only**", requires that such a Notice **must** be filed **by** the Honourable Attorney General **personally** by virtue of **Article 145 clauses (1) - (3) of the Federal Constitution** read together with s. 376(1) of the CPC, and **not** his learned Solicitor-General. Thus if the Public Prosecutor **himself did not file or give** his written consent to file such a Notice, then by virtue of s. 50(2) of the 1964 Act, any such Notice filed **without** first obtaining leave from the Court of Appeal should **not** be valid in law. Unless and until such **mandatory** leave was obtained within 14 days after I have made the aforesaid decision on revision, there can be **no** appeal against my said decision to the Court of Appeal by virtue of s. 50(2) & (2A) of the 1964 Act.

However under s. 376(2) of the CPC, it enables the learned Solicitor-General to act and carry out the functions of the Public Prosecutor in case of the latter's **absence** or inability by providing as follows:

> The Solicitor-General **shall** have all powers of a Deputy Public Prosecutor **and shall** act as Public Prosecutor in case of the **absence or inability** to act of the Attorney-General. (Emphasis, bold).

Below the signature of the learned Solicitor-General in respect of the Notice, the following were printed:

> Peguamcara Negara **dalam masa ketiadaan** Pendakwa Raya Malaysia. (Emphasis bold).

From that, I take it that she must have acted under s. 376(2) of the CPC. In that context, the powers of the Attorney General are entrenched in Article 145 of the Federal Constitution ("the Constitution"). Other then the said s. 376(2) of the CPC, s. 111(1) of the Interpretation Acts 1948 and 1967 ("the 388 Act") also speaks of **when** and **how** the learned Solicitor-General **may** exercise any of her powers exercisable **personally** by the Attorney General, but **not** otherwise. The said s. 111(1) spelt out as follows:

> (1) **Unless in any written law it is otherwise expressly provided,** the Solicitor General **may** perform any of the duties **and** may exercise any of the powers of the Attorney General. (Emphasis, bold).

Thus, even though s. 111(1) of the 388 Act empowers the learned Solicitor-General to "perform any of the duties and may exercise any powers of the Attorney General", which obviously includes the filing of the Notice as in the instant case, it is still qualified by the phrase "unless in any written law it is otherwise expressly provided". It is therefore clear to me that, under s. 376(2) of the CPC, the learned Solicitor-General can only, with the greatest respect to her, exercise any of the powers exercisable by the Attorney General

personally contemplated by art. 145 of the Constitution by virtue of the chemistry of s. 376(2) of the CPC and s. 111(1) of the 388 Act **if, and only if,** the Honourable Attorney General himself **cannot act personally due to his "absence", but not otherwise**.

According to the *Chambers Encyclopedia English Dictionary* (1994), p. 5, the word **"absence"** means:

1. the state of being away from work, etc;

2. the time when a person is away from work, etc ...

Thus the fact that the Honourable Attorney General may not be in his office because he has to perform his official duty elsewhere in Malaysia does **not** mean that "he was being away from work" or being in **"absence"** in the context of the legislative intention of s. 376(2) of the CPC.

In *Cooper v. Croll* [1940] IDLR 610 , the court has to decide whether or not a majority of a municipal council could themselves call a meeting **in the "absence"** of the mayor. It was held by Gillanders J, at pp. 615 & 616 that:

> [the Court was persuaded to accept] ... that 'absence' ... should be construed in its widest sense; that it requires no particular degree or amount of absence, *viz* from the city or the Province, and that the applicants, going as they did, to the respondent's office in the City Hall and remaining from 9.30 to 11.00 a.m. and finding the mayor not present, absence is established ... . **I cannot conclude that there was an absence** here to warrant the applicant taking the steps they did. **The respondent was in the City**; ... (Emphasis, bold).

Likewise, the word "absence" contained in s. 376(2) of the CPC surely connotes **not** just physical absence from his office, **but** that the Honourable Attorney General should at least, for example either be on official leave or out of Malaysia on the material date (ie, in the instant case; on 4 May 1998) In that respect, it is a known fact which I can take judicial notice that on **4 May 1998,** the Honourable Attorney General was in Johor Bahru performing his official duty required of him under art. 145(2) of the Federal Constitution. **"In the City"** in the aforesaid *Cooper's* case can aptly be equated with **"being in Malaysia"** in the context of s. 376(2) of the CPC, and as such, there was **no** such **"absence"** referred to by the said s. 376(2). On that basis, **and** by the interaction of the words "absence ... to act ..." (s. 376(2), CPC) and "... written law [ie, the CPC] expressly provided, ..." (s. 111(1) of the 338 Act), it is my respectful conclusion that the learned Solicitor-General **cannot** exercise any of the powers of the Honourable Attorney General entrenched in art. 145 of the Constitution. In that context, and with the greatest respect to the learned Solicitor-General, her Notice purported to be filed in the **"absence"** of the Honourable Attorney General is therefore bad in law. Thus if there is **no** Notice, there can be **no** appeal before the Court of Appeal.

Notwithstanding the Honourable Attorney General's "absence" (s. 376(2), CPC), she can certainly file in the Notice by virtue of s. 50(3) of the 1964 Act **if** there was a **"consent in writing" by** the Honourable Attorney General, consenting the learned Solicitor-General to do so. Here again, there was **no** such a "consent in writing" contemplated by the said s. 50(3). Thus without it, the Notice is therefore again **bad** in law.

If the Notice is bad in law due to what has just been discussed above, the matter is still appealable **if** there is leave to appeal granted by the Court of Appeal under s. 50(2) of the 1964 Act. Such leave **must** be obtained within 14 days **after** I have made my decision on revision under s. 50(2A) of the 1964 Act. Unfortunately, there was **no** such application. In such a situation, the Notice so filed by the learned Solicitor-General purported to be "in the absence of the Attorney-General", **should and must also** therefore be construed as being **bad** in law. Without any legally valid Notice of Appeal, there can be **no** appeal **in law** before the Court of Appeal.

Be that as it may, if I am held wrong with my above conclusion, a detailed analysis of s. 55D of the Act 155, convinced me to conclude that **each** limb of the "penalty part" of the said section **should be construed "disjunctively" from one another** and **not** "conjunctively". As such, the sentence can be imposed **either** in the "alternative" **or** "cumulatively". The three limbs of the "penalty part" I was referring to are:

(i) the fine part;

(ii) the imprisonment part; and

(iii) the whipping part.

For the ease of reference, s. 55D of the Act 155 provides:

> 55D. Any person who makes, forges or alters an endorsement or a document to be used as a Visa, Permit, Pass or Certificate under this Act shall be guilty of an offence against this Act and **shall,** on conviction, **be liable to a fine** of not less than thirty thousand ringgit but not more than one hundred thousand ringgit **and to imprisonment** for a term of not less than five years but not more than ten years **and shall also be punished** with whipping of not more than six strokes. (Emphasis, bold).

A close perusal to **cl. 16 of the Explanatory Note to the Bill** which introduced s. 55D of the Act 155 *vide* Immigration (Amendment) Act 1996 (s. 16), only states that the section "deals with the offence of forging or altering or endorsement or a document used as a Visa, Permit, Pass or Certificate." It does **not** explain as to whether the different limbs of the

"penalty part" should be interpreted "disjunctively" by virtue of the presence of the word **"and"** and the **absence of any comma after** each limb of the said "penalty part."

However, comparative analysis of a number of decided cases, compelled me to conclude that the word **"and"** contained thereto, is intended by the Legislature to have a **"disjunctive"** effect for the reasons spelt out below.

The *Concise Oxford Dictionary,* 9 Edn. (1995), p. 46, gives the meaning of the word "and", *inter alia,* as:

> ...;
>
> g. implying variety ...

Thus words "implying variety" should therefore mean, in the context of the "penalty part" of the aforesaid s. 55D **"different ways of imposing"** the **three** types of sentences provided by the said section. The ability for the court to do so is certainly the property of the **"disjunctive method"** of doing an act permitted by the said section. Thus the **presence** of the word **"and" without a comma** after each limb of the "penalty part" of the said section **should and must therefore be construed as "disjunctive" in effect** and **not** "conjunctive" as is normally assigned to the meaning of the conjunction "and".

My above conclusion is further enhanced by the persuasiveness of a Brunei's case of *Nili Anak Gumbang & Ors v. PP* [1985] 1 MLJ 464, where the court there held that, the word **"and"** present in s. 56 of the Emergency Immigration Amendment Order 1984 **has a "disjunctive" effect.** In that case, **Power J,** at p. 465, right column (G) - (I), where the aforesaid s. 56 provides that offenders are liable **"to imprisonment for a term of not less than one year and not more than seven years and a fine not exceeding twenty thousand dollars and whipping",** held that:

> It seems to me clear, by virtue of section 38 of the Interpretation and General Clause Enactment 1959 ["the 1959 Enactment], ... the word **'and'** shall signify that the penalties may be inflicted alternatively or cumulatively ... [thus] it is open to the Court under the penalty section [or part] to impose **either** a prison sentence **or** a fine **or** whipping but that, if the Court does decide to impose a prison sentence, it must be for not less than 1 year. (Emphasis, bold).

Section 38, of the 1959 Enactment provides as follows:

> 38, whenever, in or by virtue of any written law, more than one penalty is prescribed for an offence, **the use of the word 'and' shall signify that the penalties may be inflicted alternatively or cumulatively.**
>
> Provided ... . (Emphasis, bold).

In that respect, the word **"alternatively" must necessarily mean "disjunctively**"· There is also **no** comma **after** each limb of the aforesaid penalty section. Similarly in s. 55D of the Act 155, the word **"and"** is also present after each limb of the three types of the penalties provided thereto, **and,** there is also **no** comma after each such limb. Platformed by that reasoning, I firmly concluded that the word **"and"** contained in the aforesaid s. 55D **must** therefore be intended by the Legislature to be construed as **"disjunctive"** and **not** "conjunctive."

From the above analysis, it can thus be concluded that, a person who had pleaded or found guilty of committing an offence under s. 55D the Act 155, as the accused in the instant case, is liable to be punished in **one** of the following manner:

(i) **shall be liable** to a fine of **not** less than thirty thousand ringgit **but not** more than one hundred thousand ringgit; **or**

(ii) **shall be liable** to imprisonment for a term **not** less than five years **but not** more than ten years; **or**

(iii) **shall be liable** to a fine as specified in (i) above, **plus** to an imprisonment term as specified in (ii) above; **or**

(iv) **shall be liable** to an imprisonment term as per (ii) above, **and** also to whipping of **not** more than six strokes; **or**

(v) **shall be liable** to a fine as per (i) above, **plus** an imprisonment as per (ii) **above**, **and** also to whipping of not more than six strokes. Hence, it is clearly demonstrated that, the punishment as specified in **one** of the "five options" or "alternatives" open to the court to impose, having regards to fact of each particular case, **is due to the "disjunctive" effect of the word "and" found in the aforesaid section 55D.**

Lastly, the presence of the words "shall ... be liable to" in the aforesaid s. 55D **gives the court a judicial discretion as to what should be regarded by the court as an appropriate sentence** having judicially considered **all** the facts of a particular case; **and** that, is now a settled law. The words **"liable to"** was considered by Harun J (as he then was) **on revision** in the case of *PP v. Wahab* [1964] 30 MLJ 265.

In the said *Wahab's* case *supra*, the accused was charged under s. 6(1)(a) of the Corrosive and Explosive Substances and Offensive Weapons Ordinance No. 43 of 1958 ("the 43 Ord.") for having in possession of "pisau jam", a "flick knife" or a "gravity knife". He pleaded guilty to the charge and accepted by the learned magistrate whereby he ordered that the accused be whipped with four strokes of a light rattan. Since there was **no** s. 6(1)(a) of the 43 Ord., His Lordship therefore directed that the letter "(a)" after "s. 6(1)" be deleted.

Section 6(1) of the 43 Ord. provides:

> 6(1) Any person who in any public road or place carries or has in his possession or under his control any offensive weapon otherwise than with lawful authority or for a lawful purpose shall be guilty of an offence and on conviction be **liable** to imprisonment for a term not exceeding two years, **and,** to whipping. (Emphasis, bold).

As to the effect of that section, His Lordship at p. 266, (D), said:

> ... section 6(1) of the Ordinance states *inter alia* that on conviction be liable to imprisonment ... and to whipping. My interpretation of this section is **not** mandatory and **a fine may be imposed in lieu of imprisonment.** (Emphasis, bold).

In fact, the words **"shall be liable to"** found in s. 55D of the Act 155 **not** only gives the court a complete judicial discretion to impose the three types of penalties provided thereto **either** in the "alternative" or "cumulatively", **but,** in appropriate cases, it does not prevent the court to invoke s. 294 of the CPC. For that, I am well supported by the case of *Jayanathan v. PP* [1973] 2 MLJ 68, where the words "shall be liable" found in s. 15(4) of the Prevention of Crime Ordinance 1959 ("the 1959 Ord.") were considered by the then Federal Court.

Section 15(4) of the 1959 Ord. provides as follows:

> A registered person who contravenes or fails to comply with any order or restriction imposed on him under this section shall be guilty of an offence and **shall be liable** to imprisonment for a term not exceeding five years and not less than two years. (Emphasis, bold).

It was held by the said court that:

> (2) the words **'shall be liable'** in section 15(4) ... **do not make the term of imprisonment mandatory and the learned president was therefore entitled to act under section 294 [CPC] and bind over the accused.** (Emphasis, bold).

The reason for it was stated by Ong Hock Sim FJ (delivering the judgment of the court) at p. 69, (A) - (B), left column, as follows:

> In our view, if the legislature intended that section 294 is to cease to have application in respect of the offence under section 15 of [the 1959 Ord.], it should be so expressed in the clearest possible language. We can find no such provision, and

thus **it was held that,** the said s. 15(4) did not overrule the provision of s. 294 of the CPC. The same view was observed by Aitken J in the case of *PP v. Man B. Ismail* [1939] MLJ 207.

In the said *Man's* case, *supra*, Aitken J opined that, the presence of words "**shall be liable** to imprisonment for six months" in s. 3(a) of the Vagrants and Descrepit Persons Enactment (Cap 191) did **not** make imprisonment term **mandatory**. Instead, it gave the court an absolute discretion as to whether it shall award a sentence of imprisonment provided thereto or dealt with the accused under and in accordance with s. 294 of the CPC.

From the above discussion, it can be concluded that if the Legislature intended the words **"shall be liable to"** found in s. 55D of the Act 155 to overrule s. 294 of the CPC, then **it must,** to borrow the words of Ong Hock Sim FJ in the *Jayanathan's* case, *supra*, "... be so expressed in the clearest possible language." which I failed to find any. Alternatively, it should provide the words **"shall be punished"** instead of the words "shall be liable" as in the case of *PP v. Leonard Glenn Francis* [1989] 2 MLJ 158.

In the aforesaid *Leonard's* case, the accused was charged, *inter alia*, under s. 8 of the Firearms (Increased Penalties) Act 1971, which provides as follows:

> 8. Any person who is in unlawful possession of a firearm **shall be punished** with imprisonment for a term which may extend to fourteen years and with not less than six strokes. (Emphasis, bold).

The accused pleaded guilty and was subsequently **convicted** and was **bound over** in the sum of $10,000 with two sureties for five years under s. 294 of the CPC. On appeal, it was held that:

> (1) The learned president was clearly in error. Once a conviction is recorded in respect of an offence under s. 8. of the Firearms (Increased Penalties) Act 1971, the provision of s. 294 of [the CPC] are overridden and the court **must** proceed to impose a sentence of imprisonment and whipping with not less than six strokes. The sentence in respect of the first charge cannot be justified in law or on principle ... (Emphasis, bold),

which clearly shows that, where the presence of the words **"shall be punished"** upon a record of conviction, requires the court to **mandatorily** impose the sentence provided by law.

That being so, the fact that the learned magistrate did not bind over the accused in the instant case under s. 294 of the CPC which I would have done the same having regard to the facts of the case in relation to the public policy of sentencing, the question that needs further analysis is:

> **How** should the words **'shall be liable'** be put to interact with the conjunction **"and"** present **after** each limb of the 'penalty part' of the aforesaid s. 55D?

The answer to that, as demonstrated earlier above is that, by comparative case study clearly shows that:

(1) the aforesaid conjunction **"and"** should be construed **"disjunctively"**; **and**

(2) the **three** types of penalties provided thereto, ie, (i) the fine, (ii) the imprisonment term and (iii) the whipping, can be imposed **either in the "alternative" or "cumulatively"**,

which I will next endeavour to illustrate.

In *PP v. Sharikat Perusahaan Makanan Haiwan Berkerjasama 2* [1969] 2 MLJ 250, the respondents were charged under reg. 5 of the Food Control (Rice Milling) Regulations 1950 punishable under s. 22(i) of the Control of Supplies Act No. 14 of 1961. Sharma J, at p. 251 of the said case in respect of the legislative intention of the words "and" and "or", has this to say:

> it is occasionally necessary to read the conjunction 'and' as if it were 'or' so that the intent of the Legislature can be carried out. One should, however, be reluctant to convert 'and' into 'or' or *vice versa* in a penal statute if the result of it is going to be unfavourable to the subject, but there is no rule of law to that effect.

What was said above is in consonant with what was stated by Thornton in his book, *Legislature Drafting*, 3rd. Edn. (1987), at p. 287, in the following words:

> Penal provisions are not drafted in a vacuum; they are part of the wider Criminal law and that must never be overlooked. They are subject to restrictive construction and the benefit of doubt in case of possible alternative construction will be given to the accused.

From the above, it can be concluded that, what Sharma J said as "one should, ..., be reluctant to convert 'and' into 'or' ... in a penal statute ..." is because of what Thornton meant by the "penal provisions are ... subject to restrictive construction". It is more so, if such "conversion" resulted in an unfavourable effect to an accused person according to Sharma J. However, according to Thornton, if there is a possible alternative construction, the "benefit of doubt" **of** the need to convert the conjunction "and" to read as "or" "so that the **meaning and intent** of the Legislature can be carried out" **must** be given to the accused person so long as it would not be unfavourable to him. Applying that conclusion by way of parallel comparative analogy to the instant case before me, there **is** definately such "a possible alternative construction" which is certainly **not** going to be "unfavourable" to the accused. As such, it is therefore necessary to construe the conjunction "and" in the said s. 55D of the Act 155 as having a **"disjunctive effect",** enabling the court to impose the **three** types of the penalties provided thereto **either "alternatively disjunctive",** or **"cumulatively conjunctive".** That being so and after a careful evaluation all of the relevant facts of the case before me, I concluded that

the **former** option is the most fair and justifiable option to apply. There are **exhaustive** decided cases that I can adopt to support my said conclusion, of which, some have been referred to earlier by me.

In the *Nili's* case, *supra,* Power J opined that, the presence of the words:

> **... liable to imprisonment ... and a fine ... and whipping**

found in the amended s. 56 of the Brunei's Immigration Enactment, empower the court to impose the specified imprisonment sentence **or** the specified fine **or** the specified whipping **in the "alternative" disjunctively, or "cumulatively conjunctive."** It is important to note here that, in **both** the aforesaid s. 56 and s. 55 D if the Act 155 have **three (3)** common characteristics. They are:

> (1) both are provided with same types of penalty limbs, that is, (a) a fine, (b) an imprisonment and (c) whipping;
>
> (2) the word **"and"** appears **after** each of the said three limbs; **and**
>
> (3) there is **no comma after** each of the aforesaid three limbs.

Thus, the presence of such similarities convinced me to conclude that the principle applied in the said *Nili's* case should also be equally applicable to the instant case before me.

In the case of *PP v. Wahab, supra,* both the "alternative" and "cumulative" methods were in operation. In the lower court, the learned magistrate was clearly applying the "alternative" method **by** just imposing a sentence of four strokes of whipping. On revision, Harun J (as he then was), in enhancing the sentence by imposing "$50 fine in default three months imprisonment" and affirming the sentence of whipping, demonstrates clearly that he was exercising his power "cumulatively". He imposed the said fine ***in lieu of*** what he held to be a **non-mandatory imprisonment term** provided s. 6(1) of the relevant Ordinance. Under the said s. 6(1), the word **"and"** also appears **after** the specified imprisonment term **but** before the sentence of whipping. It is to be noted here that a comma **is** present **before** the word **"and"**, yet His Lordship held that, the specified imprisonment term so provided was still **not** mandatory because of the effect of the presence of the words **"liable to"** in the said section.

Section 408 of the Penal Code, which provides that a person who is convicted of the offence under the said section,

> ... shall be punished with imprisonment for a term ... **and** with whipping, and shall also be liable to fine.

came to be considered in the case of *PP v. Khairuddin* [1982] 1 MLJ 331. It is to be observed that there was **no** comma **after** the specified imprisonment term unlike the aforesaid *Wahab's* case, *supra*. In that case, Azmi J (as he then was) in enhancing one day imprisonment imposed by the learned president to 18 months, **did not** impose any sentence of whipping. In doing so, His Lordship **must** have interpreted the word "and" presence thereto as "disjunctive" and **not** conjuntive.

In *Mohamed Abdullah Ang Swee Kang v. PP* [1988] 1 MLJ 167, the accused was charged under s. 409 of the Penal Code which provides a penalty provision of a person convicted thereunder as follows:

> ... shall be punished with imprisonment ... **and** with whipping, **and** shall also be liable to fine.

He pleaded guilty to the charge preferred against him in the High Court, whereby he was convicted and sentenced to eight years imprisonment and $100,000 fine. He appealed to the **then** Supreme Court. On appeal, the said sentence was reduced to four years of imprisonment and the aforesaid fine was set aside since full restitution had been made by the accused. Here again, **both** the High Court **and** the then Supreme Court **did not** impose any whipping sentence **inspite of the presence of** the word **"and" and the absence of** any **comma after** specified imprisonment term **similar to** that found in s. 55D of the Act 155.

On the above premises, it is thus my firm conclusion that, the word **"and"** found in s. 55D of the Act 155 must therefore be construed **"conjunctively"**. Secondly, the sentences provided in the said section, can be imposed **either** in the "alternative" **or** "cumulatively". **Which** of the two options **to apply,** will have to depend on all the relevant facts of each case. In the instant case **and** on the facts, it has persuasively compelled me to adopt to the first option. In doing so, **and** on the facts, it is my considered opinion that, the most appropriate sentence would be a fine in the manner specified by the first limb of the "penalty part" of s. 55D of the Act 155. In doing so, I have **not** divorced myself from observing **and** being guided by the famous case of *R v. Ball* [1951] 35 Cr. AR 164, 165.

From the facts of the case, it was **not** denied by the accused that he did sell each falsified document at RM250. He was doing that since the introduction of the "Temporary 6 Months Work Permits" by the Immigration Department. However, neither the investigation **nor** the facts can assist me to determine as to **how much** the accused had benefitted from his wrongful activities. Without that aid, the most appropriate thing for me to fall back to is the very "penalty part" of the s. 55D of the Act 155.

From it, the **sequence** of the three limbs of the "penalty part" is **first,** a fine, followed by "the imprisonment term" and lastly "the whipping sentence." By that order, I inferred that it must have been the intention of the Legislature to punish the offender like the accused **first,** by an appropriate fine **if** the facts against his wrongful act so justified before considering the other alternative penalties. I cannot find any evidence to convince me that on the balance of probabilities, an imposition of an appropriate fine will **not** help the accused to realise his wrongful act of falsifying such documents or any other criminal act, **and** at the same time deter others from doing the same wrong. I say so because, the accused can **neither** pay the fine imposed by the court below **nor** by me; that inability to pay the fine **in itself,** beside being in remand and later in prison since his arrest, in my considered opinion, will certainly deter the accused from committing the same offence or any other criminal act of similar nature in the future. It is my humble view that, it is only when there is convincing evidence to show that the accused can **"buy"** his wrongful act with a sentence of just a fine **from** the proceeds of his wrongful act direct or indirectly that the court should find and inflict other alternative penalties (please see *Khairuddin's* case *supra*, per Azmi J (as he then was) at p. 332) but not otherwise (please see the *Abdullah Ang's* case, *supra*). I cannot find any of such evidence in the instant case before me; thus my decision on 21 April 1998.